

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

TERRY PETER GARCIA,	:	
Petitioner,	:	
	:	
-vs-	:	Civ. No. 3:01cv1837 (PCD)
	:	
IMMIGRATION & NATURALIZATION	:	
SERVICE,	:	
Respondent.	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241 claiming that his continued detention by respondent Immigration and Naturalization Service (INS) is in violation of his constitutional rights guaranteed by the Fifth, Sixth and Eighth Amendments. For the reasons set forth herein, the petition for writ of habeas corpus is denied.

I. BACKGROUND

Petitioner is a citizen of Trinidad and Tobago. On February 3, 1979, he became a lawful permanent resident of the United States. On August 23, 2000, petitioner was convicted of attempted robbery in the third degree in violation of CONN. GEN. STAT. § 53a-49 and was sentenced to five years' imprisonment that was suspended after one year served. On March 28, 2001, the INS notified him that he was subject to deportation pursuant to § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1227(a)(2)(A)(iii), for conviction of an aggravated felony involving a crime of violence.

On August 21, 2001, petitioner obtained counsel and moved for release on bond. The Immigration Judge (IJ) denied the motion on the ground that petitioner was ineligible for bond. On

August 29, 2001, the IJ ordered petitioner deported as an aggravated felon and found him ineligible for relief from deportation. On December 20, 2001, the Board of Immigration Appeals (BIA) summarily affirmed the decisions of the IJ ordering deportation and denying release on bond. Petitioner then filed the present petition for writ of habeas corpus.

II. DISCUSSION

Petitioner raises three arguments in support of his petition. First, he argues that detention without the opportunity for release on bond deprives him of his constitutional right to bail in violation of the Eighth Amendment. Next, petitioner argues that his continued detention violates his right to due process and equal protection as guaranteed by the Fifth Amendment. Third, petitioner argues that the conviction and predicate for the order of deportation itself was a product of ineffective assistance of counsel in violation of the Sixth Amendment. Each will be addressed in turn.

A. Denial of Bail

Petitioner argues that his detention without the opportunity for release on bond pursuant to § 236(c) of the INA, 8 U.S.C. § 1226(c), violates his right to bail guaranteed by the Eighth Amendment. Respondent replies that the BIA decision, issued while the petition was *sub judice*, renders the issue moot.

The BIA decision affirming the IJ's order of deportation constitutes a final order. *See* 8 C.F.R. § 241.33(a)(3). A final order of deportation represents the demarcation between procedures governed by §§ 236 and 241 of the INA. Detention prior to the issuance of a final order of deportation is governed by § 236. *See Patel v. Zemski*, 275 F.3d 299, 304 n.3 (3d Cir. 2001). Detention following a final order of deportation is governed by § 241, 8 U.S.C. § 1231(a)(6). *See id.*

Respondent argues that petitioner's change of status, from that of a detainee without a final order of deportation to that of a detainee with a final order of deportation, renders his claimed violation of his right to bail under § 236(c) moot.¹ A claim is moot when "it is impossible for the court to grant any effectual relief whatever to a prevailing party" and thus any statement on the merits of the claim would constitute an improper advisory opinion. *In re Kurtzman*, 194 F.3d 54, 58 (2d Cir. 1999)(internal quotation marks omitted). Petitioner's change of status as a consequence of the BIA decision renders any opinion as to his entitlement to release on bond as a § 237 detainee wholly advisory as he is now subject to the provisions of § 241 and the procedures for release on bond contained therein.² Absent a claimed violation under § 241 procedures, the relief sought for the alleged § 237 violation in the form of release from detention or a hearing for release on bond would countermand the procedures set forth in § 241 and are thus unavailable as a remedy. His Eighth Amendment claim is thus denied as moot.

B. Continued Detention

¹ Petitioner did not reply to respondent's supplemental reply to his habeas petition raising the issue that the petition was moot because of the BIA's decision. There is therefore no argument that his constitutional entitlement to release on bond applies with equal force to § 241.

² The IJ determines whether release on bond is appropriate prior to a final order of deportation pursuant to § 237. *See In re Valles-Perez*, 21 I. & N. Dec. 769, 772, 1997 WL 80986 (BIA 1997). After a final order of deportation issues, the district director of the INS determines whether release on bond is appropriate. *See* 8 C.F.R. § 241.4(c)(1), (h), (k)(1)(I); *Zadvydas v. Davis*, 533 U.S. 678, 683, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). There is no claim that petitioner has been subject to a denial of release on bond through the § 241 procedures set forth in 8 C.F.R. § 241 and described in *Zadvydas*, 533 U.S. at 683. The procedures defined in § 241 include initial review by the INS District Director after the ninety-day mandatory detention period to determine whether release under supervision is warranted followed by a subsequent review by an INS panel three months thereafter if the Director determines that continued detention is warranted. *See id.*

Petitioner argues that detention without bond violates his Fifth Amendment right to due process³ of the law. In light of his change of status and failure to reply to respondent's supplemental reply, there is no indication that petitioner has availed himself of the § 241 procedures described in 8 C.F.R. § 241.4(k)(2)(ii). It is further noted that as a § 241 detainee, any period of detention of a duration of less than six months is presumed consistent with due process. *See Zadvydas*, 533 U.S. at 701. Petitioner has not been detained for more than six months since the final order of removal. The period of detention is thus presumptively reasonable and consistent with due process. *See id.* As petitioner has identified no basis on which to circumvent this presumption, his due process claim is without merit.

C. Ineffective Assistance of Counsel in Criminal Proceedings

Petitioner argues that the state criminal conviction for which he was ordered deported is itself constitutionally infirm as he was not provided with effective assistance of counsel as guaranteed by the Sixth Amendment. Respondent replies that there is no evidence that petitioner exhausted available state remedies, thus the underlying state conviction may not be reviewed.

A habeas petition contesting the constitutionality of a state court conviction is brought pursuant to 28 U.S.C. § 2254, not 28 U.S.C. § 2241 as with the present petition. *See Sol v. INS*, 274 F.3d 648, 650 n.4 (2d Cir. 2001). For purposes of the alleged violation of petitioner's right to effective

³ Petitioner states that the denial of an opportunity for release also constitutes a violation of his right to equal protection argument. "The guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity." *Harris v. McRae*, 448 U.S. 297, 322, 100 S. Ct. 2671, 2691, 65 L. Ed. 2d 784 (1980). A classification is impermissible when it draws distinctions that are unreasonable, arbitrary or capricious. *See Lehr v. Robertson*, 463 U.S. 248, 265, 103 S. Ct. 2985, 2995, 77 L. Ed. 2d 614 (1983). Petitioner argues that his "detention without bond by the I.N.S. is arbitrary, capricious and illegal in that it . . . violates Petitioner's right to . . . equal protection." This tautology does not identify any classification whatsoever on which to base an equal protection claim and thus does not substantiate an alleged denial of equal protection. *See Castro v. N.Y. City Bd. of Educ.*, 777 F. Supp. 1113, 1118 (S.D.N.Y. 1990).

assistance of counsel in the state criminal proceedings, the petition will be construed as brought pursuant to § 2254. *See id.*

A habeas petitioner's ability to collaterally attack state criminal convictions is not without limitation. Section 2254 imposes the requirement that a petitioner seeking habeas review of constitutional questions involved in state criminal proceeding first exhaust available remedies in state court. *See Zarvela v. Artuz*, 254 F.3d 374, 378 (2d Cir. 2001). This requirement is premised on the sound rationale that the state first be afforded the opportunity to correct its own mistakes in criminal proceedings. *See id.* The alleged constitutional violation thus must first be argued in some form before the state court before a federal court will have the jurisdiction to review the merits of the same. *See id.* Petitioner has the burden of establishing exhaustion of available state remedies. *See Allen v. County Ct., Ulster County*, 568 F.2d 998, 1002 n.9 (2d Cir. 1977), *rev'd in part on other grounds*, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).

Petitioner provides no evidence that the ineffective assistance of counsel claim was raised before a state court.⁴ Absent such a showing, petitioner has failed to establish that he exhausted available state remedies before seeking federal habeas relief. There is thus no jurisdiction to review constitutional claims involved in his state criminal conviction.

⁴ Petitioner provides two affidavits that point out numerous mistakes made by counsel in the state criminal proceeding. There is no indication that the conviction was appealed in any form and certainly no indication that the ineffective assistance of counsel claim was itself presented to any state court.

III. CONCLUSION

The petition for writ of habeas corpus (Doc. 1) is **denied**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, May ___, 2002.

Peter C. Dorsey
United States District Judge